LIBRARY
SUPREME COURT, U. S.

FILED
NOV 4 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 786

J. F. BARNES,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

HARRIS A. GILBERT,
1310 Nashville Bank & Trust Building,
Nashville, Tennessee,

JACK NORMAN, SR.,
213 Third Avenue, North,
Nashville, Tennessee,

Attorneys for Petitioner.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

INDEX.

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Questions presented	3
Statement	3
The questions are substantial	5
Appendix A—Opinion of United States Court of Appeals for the Sixth Circuit	15
Appendix B—News items	33

Cases Cited.

Aptheker v. Secretary of State, 378 U. S. 500, 12 L. Ed. 2d 992, 84 S. Ct. 1959 8

Bass v. U. S., C. A. Ark., 1963, 324 F. 2d 168 5

Chapman v. California, 386 U. S. 18, 24 9

Clark Distillery v. Western Maryland Railroad, 242 U. S. 311 8

Compton v. U. S., C. A. Tenn., 365 F. 2d 1-3 5

Connally v. General Construction Co., 269 U. S. 385, 70 L. Ed. 322, 46 S. Ct. 126 (1926) 6

Marshall v. U. S., C. A. Cal., 1966, 355 F. 2d 999 ..5, 11, 12

Shepard v. Maxwell, 384 U. S. 333 .....5, 11

Stewart v. United States, 366 U. S. 1 .....5, 10, 11

Turf Center, Inc. v. U. S., C. A. Wash., 1963, 325 F. 2d 793 5

Turner v. Louisiana, 379 U. S. 466 13

United States v. Cardiff, 344 U. S. 174, 97 L. Ed. 200, 73 S. Ct. 189 (1952) 6
U. S. v. Azar, 243 F. Supp. 345, 347-8, E. D. Mich. 1964 7
U. S. v. Zizzo, C. A. Ind., 1964, 338 F. 2d 577, certiorari denied 85 S. Ct. 1530, 381 U. S. 915, 14 L. Ed. 2d 435 5

Statutes Cited.

Constitution of the United States Amendment V.... 2, 3
18 U. S. C. 1952 .....2, 3, 5
18 U. S. C. 3481 10
21 U. S. C. 331 6
28 U. S. C. 1254 (1) 1

Miscellaneous Cited.

80 Harvard Law Review 181-183 13
Legislative History, 1961, U. S. C. Cong. and Adm. News, p. 266 7

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. .....

J. F. BARNES,
Petitioner,
vs.
UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

Petitioner, J. F. Barnes, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on October 7, 1967.

OPINIONS BELOW.

The United States District Court for the Middle District of Tennessee did not render an opinion. The opinion of the Court of Appeals is not yet reported, but is attached to this statement as Appendix "A".

JURISDICTION.

The judgment of the Court of Appeals affirming, in part, the conviction of this defendant below was entered on October 7, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

STATUTES INVOLVED.

Constitutional Provisions: Amendment V to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

18 § 1952, United States Code, provides:

"Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury. Added Pub. L. 87-228, § 1 (a), Sept. 13, 1961, 75 Stat. 498, amended Pub. L. 89-68, July 7, 1965, 79 Stat. 212."

QUESTIONS PRESENTED.

1. Whether Title 18, U. S. C., Section 1952, the Interstate Travel Act, violates the Fifth Amendment to the Constitution of the United States?

2. Whether it was prejudicial error or harmless beyond a reasonable doubt for (a) the United States Attorney, in his jury argument, to refer to the failure of the defendant to testify in his own behalf, when considered with (b) the failure of the trial judge to grant a mistrial after prejudicial newspaper and television accounts of trial proceedings, not in evidence, were read or heard during the trial by three jurors?

STATEMENT.

On March 10, 1965, a seventeen count indictment was filed in the United States District Court for the Middle District of Tennessee, Nashville Division, charging the defendant, J. F. Barnes, and his co-defendants, James Tubb Washer and Robert Carney, with violations of Title 18, U. S. C., Sections 1952 (the Interstate Travel Act), 371 and 272, for using and willfully causing others to use

facilities of interstate commerce with the intent to carry on a business enterprise in violation of the Tennessee gambling laws. The first count was a conspiracy count and the other sixteen counts alleged substantive offenses.

Upon pleas of not guilty and trial by a jury, the defendants were found not guilty on six counts and guilty on eleven counts. The defendants were sentenced to two years imprisonment and $2,000.00 fine on each count, the sentences to run concurrently.

The Court of Appeals set aside the conviction of petitioner on the conspiracy count and entered a judgment of acquittal. The judgment of the Court of Appeals affirming the conviction of petitioner on all substantive counts was entered on October 7, 1967. The judgment of the Court of Appeals set aside the conviction of his co-defendants on all counts with directions to enter a judgment of acquittal for them. The mandate of the Court of Appeals having been stayed, this defendant remains released upon his bond pending this petition.

The substantive counts of the indictment, for which petitioner still stands convicted, charge that the defendant, at various times in the year 1964, did cause certain quantities of dice to be sent from Chicago, Illinois, and Cincinnati, Ohio, to Nashville, Tennessee, to be used in a gambling enterprise operated by defendant in violation of the law of Tennessee, and that the defendant willfully caused a Nashville, Tennessee, bank to place in the United States mails for collection, two checks drawn on out-of-state banks, the proceeds of which were used to promote the gambling enterprise. The checks were for the sums of $200.00 and $50.00. There was substantial and material proof of the charges. The defendant did not take the witness stand or put on proof.

THE QUESTIONS ARE SUBSTANTIAL.

The constitutionality of Title 18, Section 1952, U. S. C., has not been decided by this Court. The following Circuit Courts of Appeal have upheld its constitutionality:

Marshall v. U. S., C. A. Cal., 1966, 355 F. 2d 999;
U. S. v. Zizzo, C. A. Ind., 1964, 338 F. 2d 577, certiorari denied 85 S. Ct. 1530, 381 U. S. 915, 14 L. Ed. 2d 435;
Turf Center, Inc. v. U. S., C. A. Wash., 1963, 325 F. 2d 793;
Bass v. U. S., C. A. Ark., 1963, 324 F. 2d 168;
Compton v. U. S., C. A. Tenn., 365 F. 2d 1-3.

The language of the Act is so susceptible of questionable meaning and the effects of the Act are so far reaching that consideration of the constitutionality of the Act is warranted.

The argument of the prosecutor that the defendant did not call a witness, when coupled with the highly inflammatory newspaper account of proposed government proof, hereinafter described in detail, prejudiced the substantial rights of the defendant Barnes, and they were so serious that they should not be deemed harmless.

Stewart v. United States, 366 U. S. 1;
Marshall v. United States, 355 F. 2d 999;
Shepard v. Maxwell, 384 U. S. 333.

Question No. 1.

Whether Title 18, U. S. C., Section 1952, the Interstate Travel Act, violates the Fifth Amendment to the Constitution of the United States?

(a) The statutory language used in the Act is broad, uncertain, ague and indefinite and does not sufficiently warn the defendant as to the prohibited conduct.

(b) That the Act constitutes a reasonable and indiscriminate restriction of the right to travel and thereby breaches the freedom of travel.

(a) In **Connally v. General Construction Co.**, 269 U. S. 385, 70 L. Ed. 322, 46 S. Ct. 126 (1926), the Court stated:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law (citation omitted)."

70 L. Ed. 328.

In the case of **United States v. Cardiff**, 344 U. S. 174, 97 L. Ed. 200, 73 S. Ct. 189 (1952), the Court struck down a section of the Federal Food, Drug and Cosmetic Act (21 U. S. C. 331) because the criminal provision, when read with reference to the entire statute, was capable of two or more possible meanings, the Court, again citing the **Connally** opinion, supra, stated at p. 202 of the L. Ed. report:

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague, and fluid (e. g., United States v. Cohen Grocery Co., 255 U. S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula."

The statute may be divided into four elements required for conviction: (1) Any use of interstate or foreign fa-

cility with the intent (2) to facilitate the promotion, management, establishment, or carrying on (3) of any business enterprise involving (4) gambling.

Although the terms of Paragraph A of the Act are vague, the real trap for the innocent is in Paragraph B. The crux of the Act is that the use of interstate facilities shall be used to commit an unlawful activity defined as ". . . any business enterprise involving gambling . . .". A man of common intelligence would conclude that the language of the Act applied only to a gambling business such as the word "enterprise" is so defined in most standard dictionaries. Confirming this, the **caption** of the Act indicates that the Act is to be applied to a "racketeering enterprise", which was the original object of the Act, and that the Act applies to rackets conducted or organized syndicates whose influence extend from state to state. (See Legislative History, 1961, U. S. C. Cong. and Adm. News, p. 266, letter of Robert F. Kennedy, Attorney General.)

However, the scope of the Act, as held in numerous district court cases, is far more reaching than the caption. The construction now generally placed upon the Act is that if any individual should embark upon a course of conduct whereby he uses the facilities of interstate commerce to facilitate the carrying on of gambling in violation of a state law, such activity is in violation of the Act. See the discussion of same by Judge Talbot Smith in **U. S. v. Azar**, 243 F. Supp. 345, 347-8, E. D. Mich., 1964. The Act is being used primarily for the suppression of petty local gambling activities, which often have only slight interstate facility connections. The terms "business enterprise" and "involving gambling" are so vague that a man of common intelligence must guess at their meaning. Furthermore, the words are capable of two or more meanings. If a church regularly conducted a bingo game on its premises and should purchase bingo cards from a source outside of the state, apparently, this

would involve gambling in violation of most state laws and would probably subject the church officials to indictment under the Interstate Travel Act.

(b) In **Aptheker v. Secretary of State**, 378 U. S. 500, 12 L. Ed. 2d 992, 84 S. Ct. 1959, the Court found that Section 6 of the Subversive Activities Control Act indiscriminatorily violated the "freedom of travel" which the Court deemed "a constitutional liberty closely related to the rights of free speech and association" protected by the Fifth Amendment (378 U. S. 517).

The Interstate Travel Act allows a citizen of Nevada to travel to Chicago, Illinois, to purchase dice, and take them back to Nevada for gambling use, while the defendant Barnes could not travel to Chicago, Illinois, to purchase dice or have same shipped to him if they were to be used in Tennessee. Numerous examples of the conflicting state laws relating to gambling activities such as pari-mutuel horse and dog track betting, state-wide lotteries, poker houses, bingo games, etc., can be cited as examples of gambling activity that may be lawful from state to state. Congress has said that a citizen may travel from one state to another to purchase any material useful in gambling so long as it does not violate the laws of the state to which it is taken for use. If the state should have a law prohibiting its use, and the traveler should attempt to so use it unlawfully, then the facilities of interstate commerce and freedom of travel are blocked to that individual.

It is submitted this type of travel control constitutes an indiscriminate denial of freedom of travel. Most of the lower court opinions sustaining the constitutionality of the statute have relied primarily upon **Clark Distillery v. Western Maryland Railroad**, 242 U. S. 311. It is requested that the holding in the **Clark** case be reviewed.

Question No. 2.

Whether it was prejudicial error or harmless beyond a reasonable doubt for (a) the United States Attorney, in his jury argument, to refer to the failure of the defendant to testify in his own behalf, when considered with (b) the failure of the trial judge to grant a mistrial after prejudicial newspaper and television accounts of trial proceedings, not in evidence, were read or heard during the trial by three jurors?

In **Chapman v. California,** 386 U. S. 18, 24, the Court reversed a state court conviction based on the prosecutor's argument commenting on the failure of the defendant to take the witness stand. The Court held:

> "We, therefore, do no more than adhere to the meaning of our Fahy case when we hold, as we now do, that before a federal constitutional error can be harmless, the Court must be able to declare and believe that it was harmless beyond a reasonable doubt."

In the case at bar, the prosecutor made the following comment in the argument to the jury:

> "Mr. Neal: . . . There's not much reason for the government in this case to argue at great lengths. Now the defense counsel may argue at great lengths, because they rested, of course, without calling a witness, but——
>
> Mr. Norman: Except to that if Your Honor please.
>
> The Court: What was that?
>
> Mr. Neal: I say the defendants may argue at great lengths because they rested without calling a witness.
>
> Mr. Hooker: Object to that and move for a mistrial."

The trial judge instructed the jury to disregard the argument, denied the motion for a mistrial, and later in

his final instructions, instructed the jury again on the subject.

The night before, an account of the trial was run in the Nashville, Tennessee, afternoon newspaper which is adequately described in the opinion of the Court of Appeals below. This publicity, together with further publicity, was read or heard by at least three jurors, who stated that same would not influence their verdict. Same is printed as Appendix B hereto. Obviously, the publicity concerned inflammatory matters which were not introduced in the proof. The trial court had stated, out of the presence of the jury, that the proof sought to be introduced by the Government "might be pretty prejudicial" (Tr. 206), and the Government had withdrawn the proffered testimony, yet three jurors were exposed to this material, and a mistrial was denied.

The errors stated are sufficient to warrant a hearing and reversal of the judgment by this Court.

The comment of the prosecutor was barred by 18 U. S. C. 3481. The decision of the Court in **Stewart v. United States,** 366 U. S. 1, is applicable.

In Stewart v. United States, the Court stated:

> "The Fifth Amendment to the United States Constitution provides in unequivocal terms that no person may 'be compelled in any criminal case to be a witness against himself.' To protect this right Congress has declared that the failure of a defendant to testify in his own defense 'shall not create any presumption against him.' Ordinarily, the effectuation of this protection is a relatively simple matter—if the defendant chooses not to take the stand, no comment or argument about his failure to testify is permitted."
>
> **Stewart v. United States,** U. S. C., 366 U. S. 2.

"For, in its argument regarding the possibility that the jury may not have been aware of the improper question, the Government stresses the fact that the question was not emphasized by any reference to it in the instructions to the Jury; During the course of this argument the Government expressly recognizes that the danger of the situation would have been increased by a cautionary instruction in that such an instruction would have again brought the jury's attention to petitioner's prior failures to testify. Plainly, the defense was under no obligation to take such a risk. The motion for a mistrial was entirely appropriate and indeed, necessary to protect the interests of petitioner."

Stewart v. United States, U. S. C., 366 U. S. 10.

In regard to the prejudicial publicity, it is submitted that **Marshall v. United States**, 360 U. S. 310, is controlling, and that **Shepard v. Maxwell**, 384 U. S. 333, is applicable.

In the **Marshall** case, the Court set aside a Federal District Court conviction where the jurors were exposed through news accounts to information that was not admitted at trial. The Court held that the prejudice from news accounts "may be indeed greater" than when it is part of the prosecution's evidence "for then it is not tempered by protective procedures", 360 U. S. 313. Defendants do not have the benefit of the great constitutional protections and guaranties in combating news articles read during trial. The Court further felt that it was not dispositive of the case that each juror who had read the news articles had stated: '. . . he would not be influenced by the news articles, that he could decide the case only on the evidence of record and that he felt no prejudice against the petitioner as a result of the articles". 360 U. S. 312.

In the **Marshall** case, it is stated:

> "We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence."
>
> 360 U. S. 312-3.

In the case at bar, the trial judge had commented that the evidence proffered might be pretty prejudicial, but the jurors who had read or heard of it were allowed to remain on the jury, and defense counsel could never remove the stain.

In the **Marshall** case, it appears from the Court of Appeals opinion and the opinion of this Court, that there was substantial and material proof of the guilt of the defendant, that the defendant did not take the witness stand, nor did he offer any evidence. The same is true here. In the case at bar, it is said that the guilt of Barnes is so evident that the errors complained of could not have affected the verdict and the errors were harmless.

We submit the jury must have been swayed by the news accounts, which had sinister overtones. As stated by former solicitor general Archibald Cox:

> "If inadmissible evidence damaging to the defendant has been revealed, nothing said in his favor is likely to remedy the situation, just as the wrongful admission of evidence against him during the trial itself could not be cured by letting him introduce improper evidence of his own. Similarly, if newspapers published evidence which, though admissible is not in fact introduced against the defendant at trial, he is deprived of his right to confront and examine hos-

tile witnesses under oath, and the defect will not be remedied by letting him make his own counter-accusations."

80 Harvard Law Review 182-183.

The judicial basis for his statement is **Turner v. Louisiana**, where the Court stated:

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's rights of confrontation, of cross-examination, and of counsel. What happened in this case operated to subvert these basic guaranties of trial by jury."

379 U. S. 466.

We submit the errors committed at the trial are sufficient to warrant a reversal and a new trial.

Respectfully submitted,

.....

HARRIS A. GILBERT,
Thirteenth Floor,
Nashville Bank & Trust Building,
Nashville, Tennessee,

.....

JACK NORMAN, SR.,
213 Third Avenue, North,
Nashville, Tennessee,
Attorneys for Petitioner.